Vol. 83

51273

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. STEVIA HARRIS, Defendant-Appellant.	)))))))	APPEAL FROM CIRCUIT COURT, COOK COUNTY, CRIMINAL DIVISION.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

After a jury trial on a 3-count indictment, defendant was found guilty of (1) attempted rape; (2) indecent liberties; and (3) contributing to the sexual delinquency of a child. He was sentenced to concurrent terms of three to seven years on the first two charges. On appeal, defendant's sole contention is that he was not proved guilty beyond a reasonable doubt.

Darlene V. Morgan, an eleven year old girl, testified and identified defendant as a person who lived in the same building in which she lived. Their apartments were on the same floor, about 100 feet apart, and she had seen him in the corridors of the building about four times. On the evening of June 27, 1963, she went to bed in the room which she shared with her other sisters and brothers. Shortly after midnight, her mother awakened her, telling her to sleep in the parents' bedroom since the mother had to go out for awhile. Darlene went to sleep in her mother's bed, leaving a ceiling light on. There were two windows in the children's bedroom, one of which opened onto a fire escape, and both were closed when Darlene left the bedroom. During the early morning hours of June 28, Darlene was awakened by heavy pressing against her and discovered defendant was on top of her. He had one hand over her mouth--"He took the other hand and he was trying to pull my legs apart. And so he got them apart. So he told me to be

quiet, and took his hand away from over my mouth. And so I screamed. So he grabbed a tee shirt off the radiator and put it over my mouth. * * * So then I got it off and I screamed again. So then my brother [Michael] had come into the room." Michael was about five feet away, and defendant was still on top of her, and "he had his private parts out."

Darlene stated that the ceiling light was still on, and defendant was fully clothed, "but his pants was unzipped * * * down below his waist." Defendant told her to be quiet and he would give her a dollar, and she told him she didn't want it. His private parts were three or four inches away from her private parts when Michael came into the room. Defendant got up and ran out the door and returned shortly to get his cap and flashlight, and he left again. The cap was yellow with a button on the top.

Darlene further testified that when her mother arrived home at about 5:00 A.M., the police were called, and Darlene led them to the apartment of defendant.

Michael Morgan, a nine year old brother of Darlene, testified that on June 28, 1963, the family lived in apartment 316 on the third floor. He had gone to sleep about nine o'clock with the other children in the rear bedroom. The two windows in the room were closed. He heard his sister scream and found her in his mother's bed, and "I seen Stevia Harris on my sister. * * * He was getting up when I was coming in, and he pushed me and went out the door. Then, my brother [Derrick] woke up. That is when he seen him, when he came back to get his hat and flashlight." He pointed out defendant in the courtroom and stated when he first saw defendant, defendant's face was about a foot and a half to two feet away from Darlene's face. He described defendant's

cap and said that he had seen defendant in the building two times and knew where he lived--"down the hall and around." After the occurrence, he went to the apartment of defendant with his mother, Darlene and the police officers.

The third witness for the State, a Chicago police officer, testified that he and his partner arrived at the building at 5:45 A.M. on June 28, 1963. They went to Darlene's apartment, and after a discussion, Darlene led them to defendant's apartment, 336, where Mrs. Harris let them in. Defendant was sitting on a bed, and Darlene identified him as her assailant. Michael and Derrick Morgan "came into the room about two minutes later and identified the defendant as the man who was in their apartment." The police officer observed a yellow cap with a small peak and a button on the top in the Harris apartment. There were approximately 120 apartments in the building, and the windows in the children's bedroom were open.

The defendant testified that he was in his apartment with his wife continuously from 9:00 P.M. on June 27, 1963, until he was awakened by the police. They had visitors earlier in the evening and had retired after the visitors left. He denied knowing Darlene Morgan or being in her apartment at any time and denied any knowledge of the occurrence.

Defendant's wife, Mrs. Harris, corroborated his testimony that they had been home all evening with guests. They had retired about 2:00 A.M., and had not awakened until the police arrived at her apartment. Another witness for the defendant testified that she and her boy friend were playing cards with defendant in his apartment on the evening of June 27, but left shortly after midnight. A clergyman testified as to the good

moral character of defendant.

Defendant contends that the State failed in its burden of proving defendant guilty beyond a reasonable doubt, and his principal points are: (1) The record is bare as to the means employed by the defendant to gain entry into the complaining witness' apartment; there is no possible motive for the acts complained of; as directed to the defendant, there is no evidence that the defendant was a sex deviate, being married and the father of three children; and the only evidence offered by the State consisted of the victim and her younger brother. (2) The defense presented the witnesses available to establish the whereabouts of the defendant on the night of this incident together with a clergyman to attest to the good moral character of the defendant. (3) The mother of the complaining witness did not appear due to the fact she was allegedly ill from a pregnancy. No medical testimony established this fact and the testimony of this woman might have enlightened the court and jury as to some motive or hate between these two families. (4) The complaining witness stated the location of the defendant's private parts with unusual accuracy, yet she claims to have been asleep and awakened abruptly. Despite this, coupled with her fright, she was able to accurately and vividly describe the incident, much like a story that was read or suggested to her by another person. (5) Michael was impeached by statements made at a preliminary hearing.

Defendant cites People v. McGrath, 28 Ill.2d 132, 190 N.E.2d 746 (1963), where the court said (p. 135):

> "It is well established that where a conviction for taking indecent liberties is based upon the testimony of a child of tender years, the evidence must be corroborated or otherwise clear and convincing in order to sustain a judgment of guilt."

The State contends that the testimony of Darlene was clear and convincing, and that "her testimony painted a clear picture indicating that Harris had entered the apartment by means of the fire escape, found Darlene in her mother's bed, and attempted to have intercourse with the child by force. The credibility of Darlene Morgan, as a witness, was a question to be determined by the jury who had the opportunity of observing her demeanor on the witness stand and were in the best possible position to evaluate her testimony. * * * However, Darlene's testimony did not stand alone. On the contrary, substantial corroboration is to be found in the testimony of her brother, Michael, and of Officer Thomas Schmidt."

In this case, we have the testimony of Darlene and her brother arrayed against defendant's denial, his alibi and corroborating witnesses. The points raised by defendant against the State's case were circumstances and matters for the consideration of the jury in its appraisal of the credibility of the witnesses. Pertinent here is the statement made in People v. Kirilenko, 1 Ill.2d 90, 115 N.E.2d 297 (1953), where it is said (p. 97):

> "Where the evidence relating to material facts in issue is in direct conflict and cannot be reconciled, we have stated many times that it is the duty of the jury, or of a court sitting without a jury, to determine the credibility of the witnesses and the weight to be given their testimony, and, in such function, this court will not substitute its judgment for that of the jury or court."

We conclude the verdict of the jury should be affirmed.

As the two sentences are identical and concurrent, there is no reason here for the use of the rule set forth in People v. Duszkewycz, 27 Ill.2d 257, 189 N.E.2d 299 (1963), at page 261,

that two punishments cannot be imposed for a single act, even though different ingredients are involved in the two crimes. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT POLLACHEK, RAYMOND DRUGAN, HENRY P. BOLZ, TONY STAZZONE, DAVID S. GUARINO, Defendants-Appellants.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, FIRST MUNICIPAL DISTRICT. No. 50214 No. 50215 No. 50217 No. 50218 No. 50222

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The cases herein consolidated for consideration and opinion involve appeals from fines imposed for violation of Section 228(b) of the Motor Vehicle Code, Ill. Rev. Stat., ch. 95-1/2, § 228(b), (1963), which prescribes limitations on the gross weight of motor vehicles and sets forth penalties for excessive loads. These are the remainder of 29 appeals from judgments entered in similar cases. In each case the defendant was convicted of operating a motor vehicle with a gross weight in excess of the statutory limit and in each case the overweight was substantial.[1] In the cases above grouped, the points made and the authorities cited are the same in each. These issues have been resolved in favor of the State in a number of recent cases. People v. Fair, 61 Ill. App. 2d 360, 210 N.E.2d 593; People v. Fraschetti, 73 Ill. App. 2d 449, 220 N.E.2d 98; People v. Hansen, 74 Ill. App. 2d 49, 220 N.E.2d 96; People v.

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1. People v. Pollachek, overweight - 14,070 lbs.
People v. Drugan, overweight - 22,500 lbs.
People v. Bolz, overweight - 27,460 lbs.
People v. Stazzone, overweight - 27,380 lbs.
People v. Guarino, overweight - 18,050 lbs.

Ziebell, Illinois Appellate Court Gen. No. 50211; People v. Andrews, Illinois Appellate Court Gen. No. 50230; People v. Teggelaar, Illinois Appellate Court Gen. Nos. 50231-50243; People v. Chickerillo, et al., Illinois Appellate Court Gen. Nos. 50209, 50210, 50212, 50216, 50220, 50221, 50223. No purpose would be served by further discussion of these issues, and the judgments will therefore be affirmed.

Judgments affirmed.

Sullivan, P.J., and Dempsey, J., concur.

Abstract only.

83 I.A.2 191

Case No. 66-103

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1967

Abstract

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellee,	)	General Division,
	)	Rock Island County.
vs.	)	
	)	Honorable
SUSAN HUBER,	)	George O. Hebel,
	)	Judge Presiding.
Defendant-Appellant.	)	

STOUDER, P.J.

After indictment by a grand jury Defendant Appellant, Susan Huber, was found guilty by a jury of the offense of attempted murder. The Circuit Court of Rock Island County sentenced Defendant to a term of from 3 to 10 years in the penitentiary from which conviction and sentence Defendant appeals.

On March 1, 1963, Defendant had been drinking in a tavern for an indefinite period of time. She left the tavern, took a cab, purchased a revolver and returned to the tavern a half hour later. While Defendant was in the rest room, her husband, from whom she was separated, entered the tavern. After Defendant emerged from the rest room an argument ensued between Defendant and her husband, the latter refusing to talk with Defendant at a table. Defendant took out the revolver threatening to kill her husband, and, as he walked toward her, Defendant discharged the revolver the bullet hitting her husband in the hand.

Defendant's first assignment of error is that she was so intoxicated as to be unable to form or possess the requisite intent. Chap. 38, Sec. 6-3, Ill. Rev. Stat. provides, " A person who is in an intoxicated or drugged condition

is criminally responsible for conduct unless such condition either: (a) Negatives the existence of a mental state which is an element of the offense;...". Chap. 38, Sec. 8-4 (a),Ill. Rev. Stat. provides, " A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." The offense of murder also requires a specific intent or state of mind.

It is the rule in this state that voluntary intoxication is no excuse for the perpetration of a criminal act. People v. Lion, 10 Ill. 2d 208, 139 N.E. 2d 757 and People v. Brisbane, 295 Ill. 241, 129 N.E. 185. In asserting that her state of intoxication prevented the formation of the requisite intent, Defendant calls our attention to the testimony of certain witnesses. The waitress testified that at the time Defendant left the tavern to purchase the revolver she was "feeling good". The cab driver who took the Defendant to the pawn shop to purchase the revolver testified that she appeared sleepy or a little groggy. The bartender testified that he had served Defendant numerous alcoholic drinks. It also appears from the evidence that after her arrest Defendant was taken to the hospital.

Other witnesses to the incident testified that Defendant did not appear to be intoxicated. The bartender, although testifying that he served her several drinks, stated that she did not appear intoxicated, either prior to the time she left the tavern to purchase the revolver or when she returned and shot her husband. The Chief of Police, who conversed with Defendant for a period of 10 to 15 minutes shortly after the incident, also offered the opinion that Defendant was not intoxicated, but on the contrary appeared to be sober.

[1] The evidence shows clearly that Defendant had been drinking. The conflict in the evidence concerned the effect of such drinking on Defendant. Such conflict is a matter to be resolved by the jury and we can not say that the evidence fails to establish Defendant's ability to form an intent beyond a reasonable doubt.

Defendant next argues that she was entitled to use force to defend herself and that the jury's conclusion to the contrary is not supported by the evidence. Chap. 38, Sec. 7-1, Ill. Rev. Statutes provides, " A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of force. However,he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." Defendant does not argue that the jury was improperly or inadequately instructed concerning any justification for her conduct. She argues only that the evidence supports her contention that the shooting was in self defense. With this we cannot agree. The evidence indicates that after Defendant's husband refused to come over and talk with her she showed a revolver, previously concealed, and threatened to kill her husband. There appears to be little conflict in the evidence that Defendant's husband made no threats against her and had no weapon in his hands as he approached Defendant. There is no indication from the testimony of any of the witnesses that Defendant's husband approached Defendant in a threatening manner or in any manner indicating a possibility of injury or harm to the Defendant. There is no evidence in the record that after Defendant threatened to kill her husband she in any way revised her stated purpose or withdrew or abandoned her role as aggressor as in People v. Smith, 404 Ill. 350, 88 N.E. 2d 834. There is ample evidence, which if believed by the jury, justified its conclusion that Defendant's conduct was not the result of a reasonable apprehenson for her life or safety. People v. Washington, 54 Ill. App. 2d 467, 204 N.E. 2d 25.

Defendant finally argues that she was prejudiced in the selection of a juror and that the jury disregarded an instruction given by the court. From Defendant's argument we conclude that Defendant's attorney conversed with one of the jurors

after the jury had returned its verdict and the judgment of conviction had been entered. From such conversation it appears that said juror indicated a less casual acquaintance with Defendant than had been indicated in the voir dire examination and that, in the opinion of the juror, the jury might have voted for acquittal had Defendant testified and explained her actions. These matters were brought to the attention of the trial court by affidavit of Defendant's attorney filed in support of her motion for a new trial. Neither the language nor the substance of the affidavit appears in the abstract, the only reference thereto being contained in Defendant's argument. Of this practice we can not approve since it does not permit us to evaluate whatever statements may have been made and leaves us with only Defendant's conclusions as to the effect of such statements. Since the voir dire examination is likewise not included in the abstract, in absence of any specific showing of prejudice, we cannot consider this assignment of error.

According to Defendant the opinion of the juror as to the possible effect of Defendant's testimony indicates that the jury disregarded the court's instruction that Defendant was not required to testify in her own behalf nor to prove her innocence. Affidavits of jurors are not properly considered to impeach the jury's verdict. People v. Geisler et al, 348 Ill. 510, 181 N.E. 328 and People v. Brewer, 355 Ill. 348, 189 N.E. 321. Hence no error could have been committed by the trial court in this regard.

Finding no error in the judgment of the Circuit Court of Rock Island County, judgment is affirmed.

JUDGMENT AFFIRMED.

Alloy, J., and
Coryn, J. concur.

83 I.A.2 250

Filed 6-5-67

No. 66-137M

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

A

TOWER FINANCE CORPORATION,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	Appeal from Circuit
	)	Court DeKalb County
JAMES E. MC LARNING, JR.,	)	
	)	
Defendant-Appellee.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

This is an appeal from the judgment of the Circuit Court of the 16th Judicial Circuit, DeKalb County, dated July 15, 1966, that entered judgment for the defendant, James E. McLarning, Jr., and against the plaintiff, Tower Finance Corporation.

On December 28, 1964, McLarning refinanced an earlier obligation to Tower Finance Corporation and received an additional $85.54. He executed and delivered his promissory note in the amount of $612.95 payable to Tower Finance Corporation and also completed and submitted a form Financial Statement prior to his receipt of the additional funds.

On November 5, 1965, judgment by confession was entered against McLarning on the basis of the promissory note in the amount of $517.90 and a summons to confirm that judgment was served upon him on November 10. Thereafter, McLarning filed his answer on December 9 and asserted as an affirmative defense his adjudication as a

bankrupt on June 15, 1965, pursuant to his petition to the United States District Court for the Northern District of Illinois, Eastern Division. Tower Finance filed its reply to that answer and alleged that the bankruptcy was not effective to discharge McLarning's obligation to them since his Financial Statement fraudulently omitted many of his creditors and cited Section 35 (a) of Title XI, Bankruptcy, United States Code.

The matter came to trial on July 15, 1966. Tower Finance first called McLarning to testify pursuant to Section 60 of the Civil Practice Act. He admitted that he had read the printed portion of the Financial Statement, that he had completed it in his own handwriting, that he signed and submitted the Statement to Tower Finance and received the $85.54. The Statement itself was admitted into evidence, without objection, and listed five outstanding debts in a total amount of $2822.42.

McLarning further testified that he had signed the verified schedules to his bankruptcy petition that were handed to him by the attorney for Tower Finance. The schedules were also admitted into evidence and disclosed indebtedness of more than $6000.00. McLarning explained that he did not feel that he was actually liable for several of the debts listed on his bankruptcy schedule but admitted that other of said debts were actually owed by him in December of 1964, but omitted from the Financial Statement. The printed portion of the Statement included the following caption:

"Please Read These Instructions"

"This statement must be in applicant's own handwriting. Before completing and signing this statement please review all your debts

> carefully. Be sure you have disclosed all your debts of all kinds and that the facts stated in this statement are correct. Do not, under any circumstances, omit any debts. We rely upon your good faith and the truth of your representations."

The Statement also included a form receipt that recited "I/We acknowledge receipt of $ 85.54 representing funds disbursed on the loan granted me/us this date and for which the above Financial Statement was a prime consideration. . ." and was subscribed by McLarning.

The only other witness to testify was an employee of Tower Finance who stated that he was not employed by Tower in December of 1964 and was not familiar with this particular transaction. However, he did testify that it was the practice of Tower Finance to loan money only after an evaluation of the Financial Statement submitted by a borrower and that money was never advanced without receipt of that Statement.

At the conclusion of the case in chief based on this evidence, the court sustained the motion of the defendant to dismiss the complaint on the grounds that Tower Finance had failed to establish a prima facie case. The trial judge stated, in reference to the testimony of McLarning, as follows:

> "He hasn't admitted anything, any of these things other than he had put some things in there in his bankruptcy schedule. You haven't established that Tower Finance gave him the money because of this statement and whether or not he did owe any of these things. You haven't established that. I don't believe we can come in and condemn the man on his own testimony, on cross examination. You must put in some proof as to your claim."

Section 35 of the Bankruptcy Act (Title 11, United

States Code, Section 35) provides, in part, as follows:

> "Section 35. Debts Not Affected by A Discharge.
>
> (a). A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as *** (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, ***."

This section has been interpreted in two Illinois cases to bar the debtors discharge in bankruptcy as a defense to an action by a loan company for non-payment of a loan where it has been shown that the loan was made on the basis of false representations contained in a financial statement. Tower Finance Corp. v. Winemiller, 43 Ill. App. 2d 10, 17; Household Finance Corp. v. Suhr, 44 Ill. App. 2d 292, 295.

Volume 17 of the American Law Reports, Second Edition, contains a useful annotation of the cases throughout the country concerned with this particular section of the Bankruptcy Act commencing on page 1208. The annotation at page 1209 states as follows:

> "The reported decisions make it clear that, if Section 17 (11USC Sec. 35) of the Bankruptcy Act is to prevent a bankrupt's discharge from liability for a loan, the latter must be shown to have secured the loan by false representations of such character as to meet the judicial requirements for legal fraud - that is, the bankrupt's representations must have been material and false in fact, must have been made with an intent to deceive and defraud, and the creditor must have believed, acted, and relied upon them to its prejudice . . . ."

[1] The defendant recognizes that this is the law but asserts that the trial court correctly dismissed the complaint because

Tower Finance failed to establish prima facie evidence of a crucial element for its recovery - that it had relied on the statements made by McLarning before making the loan. We cannot agree with this conclusion. The Financial Statement itself indicated that the advancement of the additional $85. 54 was made on the basis of the representations of McLarning as to his outstanding debts. It is conceivable that additional evidence, introduced by the defendant, would indicate that there was in fact little or no actual reliance placed by Tower Finance on McLarning's representations. However, the record in its present state indicates that the plaintiff had presented at least enough evidence to establish a prima facie case and to cast the burden on the defendant to rebut that evidence. That the prima facie case of the plaintiff was largely established through the judicial admissions of the defendant made during his examination under Section 60 does not make it any less effective.

For the reasons stated, the judgment order of July 15, 1966, will be reversed and the cause remanded for such further action as is consistent with this opinion.

REVERSED AND REMANDED.

DAVIS, P. J. and MORAN, J. concur.

6/13 -

Filed 6/12/67

A

83 I.A.2 306

No. 66-48

In The

APPELLATE COURT OF ILLINOIS

Third District

#7

Abstract

A. D. 1967.

JAMES H. BOHANON, Plaintiff-Appellee, vs. MILDRED BOHANON, Defendant-Appellant.	Appeal from the Circuit Court of Kankakee County, Illinois. Honorable Victor N. Cardosi, Trial Judge.

PER CURIAM

This cause originated as an action for divorce. In plaintiff James H. Bohanon's complaint it is alleged that plaintiff and defendant were married on November 13, 1933, and that on October 15, 1936, defendant willfully and without cause deserted and absented herself from plaintiff. It is further alleged that in the year 1945 when plaintiff returned from military service, defendant Mildred Bohanon then consented to live with him as his wife but that after a period of three days defendant again willfully and without cause deserted him and persisted in such desertion to the date of the complaint. The answer of defendant denied the charges of desertion. On trial of the cause, the jury returned a verdict finding the issues for the plaintiff. On appeal in this Court, defendant requests reversal on the grounds (1) that the trial judge was prejudiced and was guilty of misconduct in the trial of the cause; (2) that there was error in the rulings on selection of the jury and that defendant did not have benefit of challenges for cause and all of the

peremptory challenges to which she was entitled; and (3) that the verdict of the jury is manifestly against the evidence.

Plaintiff has also moved for dismissal of the appeal because of the insufficiency of the abstract and has also moved that the report of proceedings be stricken as not being filed pursuant to Court rules. Although these motions have been taken with the case for consideration, as a result of a review of the entire record in this cause, it will not be necessary that this Court rule on the motions in view of the disposition of the cause on appeal.

We have examined the entire record and can find no basis for the assertion of the defendant that the trial judge was prejudiced or was in any manner guilty of misconduct. No hostility or unfairness is evident from the record (PEOPLE v. EVERIST, 52 Ill. App. 2d 73, 83) and there is no indication that anything was done in the course of the trial which in any manner would create prejudice in the minds of the jury (RESKE v. KLEIN, 33 Ill. App. 2d 302, 313).

Defendant has asserted in this Court that she was not accorded a fair and impartial trial because persons who may have been clients of the lawyers on the opposite side or personal friends or acquaintances of plaintiff might have been sitting as jurors to try the case. From an examination of the record we find no support for such charge. Plaintiff denies expressly that there was any basis for any such contention, and so far as the record is concerned, there is nothing whatsoever to support such contention. On the basis of the record, the jurors were qualified and unbiased and the jury selection could not be a basis for reversal (PEOPLE v. MURRAY, 73 Ill. App. 2d 376).

[4] It is also vigorously contended that the verdict is manifestly against the weight of the evidence. We have frequently said that when a cause is

tried by a jury, the verdict of the jury would not be disturbed unless it is manifestly against the weight of the evidence (GARRETT v. GARRETT, 252 Ill. 318, 327; LENNING v. LENNING, 176 Ill. 180, 185). The record discloses a conflict of evidence as to the question of desertion. There was sufficient evidence which was introduced on behalf of plaintiff to justify a jury verdict of desertion. Had the jury decided for the defendant, such verdict would also have been binding upon the plaintiff. It would be of no value to detail the evidence which was presented in the course of the trial of this cause. The action of the trial court in refusing to set aside such verdict was obviously proper and should be affirmed.

The judgment of the Circuit Court of Kankakee County will, therefore, be affirmed.

Affirmed.

No. 67-20

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1967.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. VALERIE NOVACK, Defendant-Appellant.	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Kankakee County. Honorable Sheldon Reagan, Magistrate Presiding.

ALLOY, J.

This is an appeal from a judgment revoking probation of defendant Valerie Novack. She was sentenced to serve six months in the County Jail. The appeal in this cause is taken for the purpose of reducing the sentence of six months in the County Jail which was imposed by the Circuit Court of Kankakee County.

The record shows that defendant pleaded guilty to theft, having stolen food valued at $6.69 from a food market. This was defendant's second theft offense and she also had a previous conviction for disorderly conduct. On the first theft offense she had been sentenced to one year in jail, but the sentence was suspended and defendant was placed on three year probation. A few days after she was placed on probation, defendant was arrested on December 7, 1966, on a disorderly conduct charge. To this charge she pleaded guilty and was fined $200 plus costs. She spent four days in jail before paying the fine and costs. Defendant testified that she had a drinking problem and had been drinking when

she was arrested. On the hearing to revoke her probation, defendant testified she was told earlier by the judge to get a job to help support her eleven month old child. She had not done this but again became involved in drinking which she felt was the real source of her trouble. She also testified that she was sorry and would try to curb her drinking. The magistrate who conducted the hearing sentenced defendant to six months in the County Jail.

On appeal in this Court, defendant contends that such sentence was excessive. While we are authorized to review sentences in proper cases and to reduce such sentences without the necessity of reversing a conviction, the standard to be employed by a reviewing court in determining whether to act in such case is whether or not the sentence is manifestly excessive (PEOPLE v. HOBBS, 56 Ill. App. 2d 93, at 99). As stated in the case of PEOPLE v. TAYLOR, 33 Ill. 2d 417, at 424:

> " . . . where it is contended that the punishment imposed in a particular case is excessive, though within the limits prescribed by the legislature, this court should not disturb the sentence unless it clearly appears that the penalty constitutes a great departure from the fundamental law and its spirit and purpose, or that the penalty is manifestly in excess of the prescription of section 11 of article II of the Illinois constitution which requires that all penalties shall be proportioned to the nature of the offense."

The Supreme Court in such case also indicated that the power to reduce sentences should be applied with considerable caution and circumspection, where the trial judge ordinarily has a superior opportunity in the course of the trial and the hearing in aggravation and mitigation to make a sound determination concerning the punishment to be imposed than do the appellate tribunals (See also PEOPLE v. SHOCKEY, 66 Ill. App. 2d 245, at 251).

In sitting in review on cases such as are now presented to us, we are necessarily at a disadvantage in not having the opportunity to observe the defendant and to hear the evidence directly. Such being the case, we should act only in cases where the record indicates that the trial court abused its

discretion in imposing sentence. It is not a question of what we, sitting as triers of the cause, might have done were we in the same position, but whether the record shows an abuse of discretion which justifies a reduction of sentence by the court of review. Under the facts in the record of the cause before us, we do not find that the record justifies action by this Court under the statute in reducing such sentence (1965 Illinois Revised Statutes, Ch. 38 §121-9). The order of the Circuit Court of Kankakee County will, therefore, be affirmed.

Affirmed.

Stouder, P. J. and Coryn, J. concur.

83 I.A.2 394(1)

NO. 66-142

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ARROW LATHING & PLASTERING, INC., a Corporation, Plaintiff-Appellee, vs. SCHAULAT PLUMBING SUPPLY COMPANY, INC., Defendant-Appellee, vs. HAROLD TOTTLEBEN, d/b/a C. & F. BUILDERS; HATTIE E. TOTTLEBEN; and UNKNOWN OWNERS; Defendants, vs. WALTER E. WILLE; MRS. WALTER E. WILLE; ROY A. WITTMAN; MRS. ROY A. WITTMAN; and UNION SAVINGS & LOAN ASSOCIATION; Defendants-Appellants.	Appeal from the Circuit Court of Madison County. Honorable James O. Monroe, Judge Presiding.

Goldenhersh, J.

Defendants, Wille, Wittman, and Union Savings and Loan Association, hereafter referred to as Union, appeal from the decree of the Circuit Court of Madison County awarding mechanic's liens to plaintiff, Arrow Lathing & Plastering, Inc., hereafter referred to as Arrow, and to defendant, Schaulat Plumbing Supply Company, Inc., hereafter referred to as Schaulat, and in the event of defendants' failure to pay the sums found due, ordering the sale of the premises to which the liens attach.

On December 3, 1963, defendant, Harold J. Tottleben, then the fee owner, conveyed the premises here involved, in trust, to Herbert

H. Esterlein, Trustee, with Tottleben named as owner of the beneficial interest under the trust.

In July of 1964 Tottleben entered into an oral agreement with Arrow to do the lathing and plastering, and an oral contract with Schaulat to do the plumbing work, on a house which Tottleben was constructing on the lot. Arrow was to be paid the sum of $1072.00, no part of which was paid. Schaulat was to be paid $1510.00, of which Tottleben has paid $750.00.

On October 1, 1964, Tottleben entered into a written contract in which he agreed to sell the property to a couple named Parsons. He agreed to complete the house in a good and workmanlike manner and convey merchantable title. The Parsons agreed to pay the purchase price upon completion of the house, part in cash, and the balance by execution of a note and mortgage to defendant, Union. On October 8, 1964, Herbert H. Esterlein, Trustee, by quit claim deed, conveyed the premises to Tottleben and his wife. By warranty deed dated October 9, 1964, and recorded October 16, 1964, Tottleben and his wife conveyed the property to the Parsons.

The loan committee of defendant, Union, inspected the property in September, October and early November, and on November 7, 1964, defendant, Tottleben, executed an affidavit wherein he certified that "all labor and material are complete in full consideration." On the same day, Union disbursed the proceeds of the mortgage to Tottleben. On March 10, 1965, the Parsons conveyed the property to Union and were released from further liability under the note.

The evidence shows that the lathing and plastering were substantially completed on August 4, 1964, and on several occasions plaintiff, Arrow, requested payment from Tottleben. An officer

of plaintiff testified that on Christmas eve, while delivering gifts, he saw Tottleben, who gave him the key to the house and asked him "to touch it up so he could get his money". The "pointing up" was done on January 5, 1965, and required less than an hour to complete. He stated that the pointing up is part of the contract, is included in the price, and was usually done when the contractor requested it.

Another plastering contractor, with 30 years of experience in the business, testified that it is usual and customary to include in the contract, the pointing up, which is done after the other trades finish their work, and that no additional charge is made.

The evidence adduced by defendant, Schaulat, is to the effect that most of its work was finished in September, there was some work performed in November, and on January 6, 1965, it completed its work. On that date it tested the water lines, put on closet seats, anchored some faucets, put in some washers and checked for leaks and drips.

Union has sold the property to the defendants, Wille, and a title search revealed plaintiff's, and defendant, Schaulat's, liens, filed respectively April 26, 1965 and May 5, 1965.

Defendants contend that the trial court erred in awarding the liens for the reasons that neither lien claimant proved that its claim was supported by a valid contract, and further, that the work was completed in August and September 1964, and the services performed in January 1965 were rendered for the purpose of extending the time for filing the liens. With respect of the lien of plaintiff, Arrow, defendants also contend that under the doctrine of equitable estoppel, plaintiff is estopped from asserting a lien valid as to these defendants.

In support of their contentions, defendants cite Fettes, Love & Sieben, Inc. v. Simon, 46 Ill. App. 2d 232, 196 N. E. 2d 700, and Alexander Hendry Co. v. Mooar, 242 Ill. App. 516. The Fettes case is so clearly distinguishable as to require no further discussion.

In Alexander Hendry Co., the court found that the work done was "in the nature of new and separate work", and was not part of the original contract.

Although the decree contains no specific findings of fact, it is essential thereto that the trial court find that the work performed in January 1965, was part of, and completed in substantial accord with, the oral contracts entered into between Tottleben and the claimants. Upon examination of the testimony we cannot say that the conclusion reached by the trial court is manifestly erroneous, and therefore, it will not be disturbed. People ex rel v. C. & N. W. Ry. Co., 17 Ill. 2d 307.

The contention of defendant, Union, that plaintiff, Arrow, is equitably estopped from claiming a lien is based upon a conversation between Earl Jukes, a loan officer of Union, and Peter Eberle, the principal officer of Arrow. Mr. Jukes testified that in January 1965, Mr. Eberle told him plaintiff had not been paid for the lathing and plastering work, that he (Jukes) was surprised because "we had a waiver indicating it had all been paid for", that he asked when the work was done, and Eberle stated it had been several months and he was beyond his lien time. In Dill v. Widman, 413 Ill. 448, the Supreme Court, discussing equitable estoppel, said at page 455, "The general rule is that where a party by his statements or conduct leads another to do something he would not have done but for the statements or conduct of the other, the one guilty of the expressions

or conduct will not be allowed to deny his utterances or acts to the loss or damage of the other party. The party claiming the estoppel must have relied upon the acts or representations of the other and have had no knowledge or convenient means of knowing the true facts. Fraud is a necessary element but it is not essential that there be a fraudulent intent. It is sufficient if a fraudulent effect would follow upon allowing a party to set up a claim inconsistent with his former declarations."

It appears from the evidence that Union had disbursed its funds in November 1964, prior to the conversation between Jukes and Eberle, and in so doing did not rely upon any representation of Eberle. It is not shown that in its subsequent transaction with Parsons it relied, or was influenced by, the statements of Eberle. The statement was at most an erroneous legal conclusion, and does not give rise to an equitable estoppel.

For the reasons set forth, the decree of the Circuit Court of Madison County is affirmed.

Decree Affirmed.

Concur: Edward C. Eberspacher

Concur: George J. Moran

PUBLISH ABSTRACT ONLY

Filed 6-21-67

83 I.A.2d 394 (2)

No. 66-116

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1967

Abstract

CAROL SUE DENT, Plaintiff-Appellant, vs. WILLIAM W. DENT, Defendant-Appellee.	Appeal from the Circuit Court of Kankakee County, Illinois.

CORYN, J.

This is an appeal by plaintiff, Carol Sue Dent, now Carol Sue LaGesse, from a decree modifying custody provisions of a divorce decree changing the care, custody and control of the minor child of the parties, James Russell Dent, from plaintiff-mother to defendant-father, William W. Dent, except during summer school vacations when plaintiff shall have temporary custody of said child. The defendant's petition to modify, filed June 13, 1966, alleged that said child, while in the custody of his mother, developed a nervous or emotional instability causing difficulties in school; that in the fall of 1965 plaintiff requested defendant to take custody of said child and place him in school in Morris, Illinois; that in January of 1965 defendant remarried; that defendant has been steadily employed at the same occupation for more than six years; that plaintiff, since the original divorce

decree of September 25, 1961, has been married and divorced; and that plaintiff is unemployed and does not have adequate living quarters for said child. A hearing was held on this petition on July 29, 1966, and on September 9, 1966, the trial court entered an order changing custody of the child from plaintiff to defendant, from which order plaintiff here appeals.

Defendant testified that he is a construction worker employed by the Lockport Plastering Company, and earns $9,000.00 per year. He stated that before school started in 1965, plaintiff asked him if he would take their son and put him in school at Morris, where defendant resides, and that he agreed and kept the child up until almost the end of the school year, but that on June 4, 1966, shortly before the end of said school year, plaintiff picked the child up at Morris and never returned him to the defendant. Defendant is now remarried, and testified that he has adequate room in his home for the child, and that neither he nor his second wife have any other children. His present wife, Bernice Dent, testified that she desires to have the child in her home, and that during the past school year, when the child was living with her and the defendant, she spent many hours tutoring him in an effort to bring him up to an average standard with his first-grade classmates. Helen Bruder, the child's teacher in first grade in Morris during the school year 1965-1966, testified that the child was very immature and physically uncoordinated for a child of seven years old, but that he seemed happy and was responsive in the classroom. Mrs. Bruder was quite pleased with the achievement level reached by the boy by the end of that school year, and felt that with two months of tutoring during the summer he could pass into the second grade. She testified that Bernice Dent was very cooperative and that she had more conferences

with her than any mother during that school year.

Plaintiff testified that in the fall of 1965 she sent the boy to his father because she was concerned about his education and because she was having financial difficulties at that time. She stated that she now lives in Kankakee with her mother and sister in a two bedroom apartment where she and the boy share a bedroom with her infant child. She said the boy is happy in this home, and that there is always someone available to take care of him. Plaintiff is employed as a babysitter at $30.00 per week, and takes the child with her on these jobs. Since her divorce from the defendant in 1961, she has been married and divorced from LaGesse, one child being born as issue of that marriage. She testified that she and the defendant had an agreement that he would keep the child during the school year and that she would keep the child during the summer and on weekends. She said that she was afraid defendant would not give her custody during the summer of 1966, and that, therefore, she refused to return the child on June 4th, 1966. She said that this alleged agreement regarding custody with defendant was for a trial period of one year only. The plaintiff offered the testimony of Mabel Hillikar, who stated that she was a retired school teacher and had been tutoring the boy during the summer of 1966. She stated that the child's mother had cooperated and assisted her in the tutoring, and that if the tutoring was successful, James Dent would be able to enroll in second grade in the fall.

The legal principles involved in this appeal are the same ones we reviewed in Kline v. Kline, 57 Ill. App. 2d 244, and in which opinion we referred frequently to Nye v. Nye, 411 Ill. 408. In Kline v. Kline, at 246, we stated as follows: "It is long established law that where both are fit

persons, the principals to a divorce proceeding have equal right to custody of their minor children, and that the paramount consideration in settling the issue of child custody is the welfare and best interests of the children themselves, without any purpose of penalizing the parent upon whom the blame for the dissolution of the marital union may be fixed. Although it is admittedly a flexible guide, and every case must be controlled by its own facts and merits, courts have sometimes ruled that the interests of children of tender years are better served when their care is committed to the mother. In any event, once the issue is settled, it requires substantial evidence of new facts to justify an alteration. It is not necessary for the validity of an order changing custody to another parent, however, that the evidence of new facts establish the present unfitness of the parent to whom custody has been previously entrusted, if other circumstances are clearly shown which require a modification for the welfare of the children."

Trial courts have broad discretionary power to modify custody provisions of divorce decrees, and consequently the decisions of the trial court on custody matters should not be disturbed unless palpably erroneous, that is, clearly against the manifest weight of the evidence. Kline v. Kline, supra; Hahn v. Hahn, 69 Ill. App. 2d 302; Nye v. Nye, supra. In the instant case there is no significant conflict in the evidence. James Dent was three years old at the time of the 1961 divorce. In September, 1964, plaintiff enrolled him in first grade at Bourbonnais, but withdrew him on November 16, 1964, apparently on recommendation of the school authorities because of his immaturity. In the fall of 1965 the plaintiff voluntarily placed the child in the defendant's care, asserting as one of her reasons for doing so that she was concerned about the boy's education. During the 1965-1966 school year, the defendant had the boy enrolled in the first grade at Morris, where,

according to his teacher, he made progress and would be ready for second grade if tutored during the summer of 1966. The record also disclosed that since the divorce of 1961, plaintiff had frequently moved, had experienced a turbulent remarriage finally culminating in a second divorce, and was living in a two bedroom house with her mother and sister, sharing one of the bedrooms with James and her infant child. Defendant, since the 1961 divorce, had remarried and was living in Morris where he was steadily employed.

The trial court found "that changed circumstances in the living standards and marital status of the parties and in the schooling needs of the child of the parties require that for the welfare of the child, James Russell Dent, custody should be transferred from plaintiff to defendant." The trial court obviously concluded that the child had and would continue to make greater educational progress while living in the more stable atmosphere of his father's home. The decree of modification, we conclude, is supported by the evidence and therefore is affirmed.

Affirmed.

Stouder, P. J. and Alloy, J. concur.

Case No. 66-46

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1967

IN THE MATTER OF THE ESTATE OF FRED RUEBUSH, DECEASED. ERNEST SIMPSON, Claimant-Appellee, vs. HENRY RUEBUSH, as Administrator of the Estate of Fred Ruebush, Deceased, Respondent-Appellant.	Appeal from the Circuit Court of the Ninth Judicial Circuit of Illinois, County of McDonough. Honorable Scott I. Klukos, Judge Presiding.

Abstract

STOUDER, P.J.

Ernest Simpson, Appellee, filed a claim in the County Court (now Circuit Court) of McDonough County against the estate of Fred Ruebush, said claim being based on a promissory note in the principle sum of $60,000.00. The claim was disallowed and upon appeal the Appellate Court in Re Ruebush's Estate, 53 Ill. App. 2d 54, reversed and remanded the judgment with directions that Simpson be awarded a new trial. After a new trial the claim was allowed in full and it is from this judgment that Henry Ruebush, Administrator of the estate, prosecutes this appeal.

The general nature of the controversy is discussed in Re Ruebush's Estate, 53 Ill. App. 2d 54, and we believe that no useful purpose would be served in restating the events which are the basis for this controversy. Appellant's first assignment of error is that in effect the trial court did not conduct a new trial nor did the trial court make independent findings of fact on the basis of a new trial. In support of this contention Appellant relies primarily upon the introductory statement in the memorandum opinion of the trial court judge. This statement is as follows, "The series of events or transactions elicited on

the retrial of this case are basically the same as those on the first trial of this case, 53 Ill. App. 2d 54, and the court will not restate them in detail.". Appellant itemizes seventeen respects in which the evidence at the second trial differed from that at the first trial and concludes, on the basis of the introductory statement of the trial judge, that such evidence was ignored. We find no merit in Appellant's contention and no indication from such statement that any of the evidence was ignored by the trial judge. Each party was afforded an ample opportunity to present evidence in support of his position and did so. No error is claimed in the admission or rejection of evidence. The record reveals that the testimony of the witnesses as presented at the second trial differed in some respects from their testimony at the first trial. In view of the Appellate Court decision, the parties deemed it appropriate to offer evidence at the second trial which was not presented at the first. The trial court, in its memorandum opinion, stated that the promissory note was duly executed and delivered, was not secured by fraud or mistake, was not a gift or testamentary in character and that there had been no failure of consideration in whole or in part. We do not see how any adverse or prejudicial significance can be attached to the introductory remarks of the trial judge.

Appellant's next assignment of error is that the trial court improperly allocated the burden of proof with respect to the issue of failure or lack of consideration. The record reveals the note was produced, witnesses thereto testified to its due execution and delivery, and that the Appellee then rested. Appellee was called to testify by Appellant under Section 60 and facts were elicited from him concerning the events prior to and surrounding the execution of the note and also the consideration therefore as claimed by Appellee. Appellant then endeavored to prove by questioning of Appellee himself as well as by the introduction of the testimony of other witnesses both that the note was not properly executed or delivered and that there was no actual consideration for the note as claimed by Appellee. Thus it can be seen with respect to the issue of consideration, the defense of Appellant was directed against the alleged claim

of actual consideration and not against the presumption of consideration arising from mere proof of execution and delivery of the note. As is said in Johnson v. Pendergast, 308 Ill. 255, 139 N.E. 407, the ultimate burden of persuasion always remains with the Plaintiff. In reviewing the memorandum opinion of the trial court we find no indication of any contrary principle and the conclusion of the trial court that there was actual consideration for the note is supported by ample evidence.

Next we turn to Appellant's contention that the trial court did not follow the directions of the Appellate Court to consider pro tanto allowance of the claim based on partial consideration for the note. Appellant does not claim that the opinion of the Appellate Court in Re Ruebush's Estate, supra, determined that Simpson was entitled only to a pro tanto allowance of his claim. Rather Appellant objects to the trial court's conclusion that the note was not based on partial consideration or there was no partial failure of consideration. According to Appellee, at the time the $60,000.00 note was executed and delivered, Appellee surrendered a prior note in the amount of $37,500.00 to the decedent and agreed to work for decedent for a weekly wage of $36.00 during decedent's lifetime. Simpson also testified concerning the items making up the consideration for the $37,500.00 note. Appellant by his evidence, endeavored to show that the $37,500.00 note was in excess of the value of the claimed consideration therefore and further that since Simpson was being paid at the prevailing wage rate his alleged employment agreement was of no value to the decedent. Notwithstanding the conflicts in the evidence concerning the value of the consideration, we agree with the trial court that there is no adequate basis in the evidence for concluding decedent received less than that for which he had bargained or that there was any partial failure of consideration. The valuation of consideration is peculiarly within the province of the obligor and his obligation will be binding when entered into freely and voluntarily without fraud or imposition. This is particularly true of obligations concerning persnnal services, such services having no exact likeness in any other, and justifying, by virtue of peculiar circumstances

of urgency, timeliness, fidelity, result, an estimate by the party for whom they are rendered far beyond the value of others of generally like kind. Forbes v. Williams, 13 Ill. App. 280.

Appellant also argues that Appellee failed to prove execution and delivery of the note. We find no support for this contention. Although at the second trial Appellant offered evidence of additional witnesses to the effect that decedent was someplace else at the time the note was alleged to have been executed and although the handwriting expert enlarged his testimony, nevertheless the finding of the trial court that the note was duly executed and delivered is supported by ample evidence.

Lastly Appellant argues that the note is unenforceable by virtue of the statute of frauds, because based on a partly oral contract which could not be performed within one year. It is evident that this contention arises rather late in the litigation and in our opinion too late, since both parties concede that the matter was first urged during the oral arguments on the motion for a new trial made at the conclusion of the second trial. Whether the defense of the statute of frauds need be specifically or affirmatively alleged it is clear that there must be some indication that the party relying on the statute intends to interpose such statute as a defense. Kohlbrecker v. Guttermann, 329 Ill. 246, 160 N.E. 142. The defense of the statute of frauds may be waived and if not asserted is deemed waived. Thomas v. Pope, 380 Ill. 206, 43 N.E. 2d 1003. We find nothing in the record from which it can be concluded that Appellant relied upon or intended to rely upon the statute as a defense.

Finding no error in the judgment of the Circuit Court of McDonough County the judgment of said court is affirmed.

JUDGMENT AFFIRMED.

Alloy, J., and
Coryn, J. concur.

83 I.A.2d 422 (1)

NO. 66-136

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
vs.	)	Hon. Joseph J. Barr,
	)	Trial Judge.
JOHN WESLEY HARRIS,	)	
	)	
Defendant-Appellant.	)	

Goldenhersh, J.

Defendant was tried by jury in the Circuit Court of Madison County, convicted of the crime of Armed Robbery (Ch. 38, sec. 18-2, Ill. Rev. Stat. 1965) and sentenced to the Illinois State Penitentiary for not less than 3 nor more than 6 years. This court allowed a petition for leave to appeal, filed pro se, and appointed counsel to represent the defendant.

Defendant contends that evidence erroneously admitted was so prejudicial as to deprive him of a fair trial.

The People argue that the alleged errors were not preserved for review because the evidence now complained of was admitted without objection, and its admission is not assigned as error in the post trial motion.

Ch. 38, sec. 121-9(a), Ill. Rev. Stat. 1965 provides "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." In The People v. Weinstein, 35 Ill. 2d 467, at page 471, the Supreme Court said "The People urge that the improper argument was not preserved for review because the defense counsel failed in some instances to object. This court, however, will consider errors not

properly preserved in a criminal case where the evidence is evenly balanced, (People v. Bradley, 30 Ill. 2d 597), or where their nature is such as to deprive an accused of his constitutional rights."

In our opinion the errors hereinafter reviewed deprived defendant of his constitutional right to a fair trial.

During the direct examination of a police lieutenant called by The People, the witness testified as follows:

"Q. Was an effort made to take a statement?

A. I did.

Q. Did the Defendant make a statement?

A. No, we told him of his right to make a statement or remain mute and he done that.

Q. And has until today?

A. That is right, sir."

In The People v. Lewerenz, 24 Ill. 2d 295, the Supreme Court at page 299, said: "The trial court also permitted the prosecution to prove, over defendant's objection, that at the time of his arrest defendant had refused to make a statement on advice of counsel. This, too, was prejudicial error in both cases. As pointed out in People v. Rothe, 358 Ill. 52, 57, an accused is within his rights when he refuses to make a statement, and the fact that he exercised such right has no tendency to prove or disprove the charge against him, thus making evidence of his refusal neither material or relevant to the issue being tried."

Another officer, interrogated as to his part in the investigation of the crime, testified:

"Q. Tell us how you pursued the investigation only as it

relates to this defendant.

A. The only thing I did in reference to this was I was in the station when the subject was brought in and booked. He made a statement implicating another subject. I left the station. That is the only thing except later on that morning when the subject that was robbed came into the station I assisted the officers in taking the defendant out of jail into the showup room."

The testimony with regard to the statement, the nature and content of which is not shown, consists of the conclusion of the witness, is clearly improper, and its admission was prejudicial. The same witness was asked:

"Q. Were you there when identification was made of this defendant?

A. I was in the showup room with three subjects.

Q. Were you there when Oetken came in?

A. Yes, sir.

Q. And identified this defendant from the lineup?

A. Yes, sir."

The record fails to show that the "identification" was made in the presence or hearing of the defendant, and absent such a showing, it was error to admit the testimony. The People v. Krejewski, 332 Ill. 120; The People v. Lukoszus, 242 Ill. 101; The People v. Stella, 344 Ill. 589, l. c. 592.

The defendant denied the offense, and the identification of the perpetrator of the crime rests on the testimony of the complaining witness, Oetken. This court cannot determine the extent to which the testimony above reviewed influenced the jury's verdict, and as stated by the Supreme Court in reviewing the error in People v.

Weinstein, "Doubt as to its harmful effect must be resolved in favor of the defendant."

This record is an example of the unfortunate situation which arises when the trial court is not given the opportunity, either by objection to testimony, or in a post trial motion, to avoid, or correct error. We are aware of the opinions which state that the trial court, to prevent error, should inject itself into the proceedings, even though no objections are made. Experience, however, teaches us that there are many situations which arise during trial where active participation by the trial court creates a greater evil than that which it intended to avoid. A more satisfactory alternative is that counsel voluntarily stay within the bounds prescribed by the rules of evidence.

There are other errors assigned which we do not discuss because we deem it unlikely that the same situations will arise upon retrial.

For the reasons herein set forth, the judgment of the Circuit Court of Madison County is reversed and the cause remanded for a new trial.

The court wishes to thank appointed counsel for an excellent presentation of the issues.

Judgment reversed and cause remanded for a new trial.

Concur: Edward C. Eberspacher

Concur: George J. Moran

PUBLISH ABSTRACT ONLY

83 I.A.2d 422 (2)

Case No. 66-95

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1967

Abstract

BOARD OF EDUCATION OF GARDENER SCHOOL DISTRICT NO. 112, PEORIA COUNTY, ILLINOIS,

Plaintiff-Appellant,

vs.

COUNTY BOARD OF SCHOOL TRUSTEES OF PEORIA COUNTY, ILLINOIS; BOARD OF EDUCATION OF PEORIA HEIGHTS SCHOOL DISTRICT NO. 120, PEORIA COUNTY, ILLINOIS; and JOSEPH H. BATCHELDER, JR., PEGGY B. BATCHELDER, LOUIS B. NEUMILLER, SELMA E. NEUMILLER, HERBERT B. WHITE, MADELINE R. WHITE, JAMES R. MUNRO, FLORENCE F. MUNRO, A.T. BROWN and FLORENCE P. BROWN,

Defendants-Appellees.

Appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois

Honorable Robert E. Hunt, Trial Judge.

STOUDER, P.J.

Petitioners Appellees, as owners of twenty-one improved residential lots situated in Peoria Heights, commenced this action in 1960 by filing a petition with the County Board of School Trustees of Peoria County requesting detachment of said lots from the Gardener School District No. 112 and annexation to Peoria Heights District No. 120. Only six members of the Board of School Trustees participated in the hearing on the detachment petition and their vote on the allowance thereof was a tie. A review of such action by the Circuit Court of Peoria County resulted in the case being remanded for further hearings before the County Board of School Trustees. Upon further consideration in 1962 the Board of School Trustees approved the transfer of territory. After review in the Circuit and Supreme Courts the matter was again remanded for further hearings by the Board of School Trustees. In 1966 the Board again approved the transfer of territory which decision was affirmed by the Circuit Court of Peoria County under the provisions of the Administrative Review Act and it is now urged in this court that

the judgment of the Circuit Court is erroneous.

Appellant, Gardener District, urges first that the Board of School Trustees was without jurisdiction to enter its order granting the transfer and second that the order of transfer is contrary to law and unsupported by the evidence.

With respect to the first assignment of error, it is argued that the County Board of School Trustees, in violation of the statute, entered its order granting the transfer more than 30 days after the hearing had been concluded. Section 7-6, Chap. 122, Ill. Rev. Stat. 1965, provides in part "...at the conclusion of the hearing the County Superintendent of schools as ex officio member of the County Board of School Trustees shall within 30 days enter an order either granting or denying the petition...". The record shows that January 3, 1966, was the last day on which the Board of Trustees heard witnesses as such. On that date the hearing was continued until February 7, 1966, in order that the Board have time to consider the transcripts of evidence presented at the previous hearings. The order of the Board granting the transfer was filed February 15, 1966. It is the contention of Appellant that the adjournment or continuance of the meeting could not be employed as a device for delaying the order determining the issues and consequently the Board lost jurisdiction for having failed to file its order within 30 days after January 3, 1966. We find no support for this contention since the continuation of the hearing for the purpose of considering previous transcripts was not for the purpose of delay but to enable the Board to consider evidence presented at hearings some of which evidence had been presented more than 5 years prior thereto. We believe that technical compliance with the rule is shown by the record and no prejudice is shown by Appellant as a consequence of the manner in which the procedure was conducted. Savanna Comm. High School Dist. v. County Board, 73 Ill. App. 2d 202, 218 N.E. 2d 811.

Appellant's next assignment of error is that the decision of the Board of School Trustees is not supported by sufficient evidence. There is little conflict in the evidence and it will be summarized briefly. All parties agree that the elementary school of the Gardener District and that of the Peoria Heights District have good accredited educational programs. Teacher pupil ratios are the same, the Gardener District having 185 pupils, and Peoria Heights 824. The assessed

valuation of the property sought to be attached is $317,230.00. Loss of revenue to Gardener if the detachment is allowed would be 4.8% of total revenue and the increase to Peoria Heights would be 1.3%. If detachment is allowed the assessed valuation per pupil in the Gardener District would still be higher than that in the Peoria Heights District. Gardener is presently levying $1.35, the maximum amount without referendum. All parties concede that the loss or gain of revenue would not effect the ability of either district to carry out an effective program although Gardener contends that it will be unable to expand as might be deemed desirable.

The principal conflict concerning the propriety of the Board's action arises from the location of the subject property in relation to that of the schools, the transportation to each school and the community relationship of the subject property. It appears that the subject property, as is the rest of Peoria Heights itself, is located on a high bluff overlooking the Illinois River. The property is located on or near Grand View Drive which is a curving road leading from the bluff down to Galena Road which runs along the bottom of the valley to the Gardener school. The Gardener school operates a school bus along Galena Road. Pupils residing in the subject area would either have to walk or be transported 1.2 miles to where they would be picked up by the Gardener school bus and transported an additional 3 miles to the Gardener school. By the most practical automobile route it is 1.3 miles from the subject property to the Peoria Heights school although by walking across the golf course the distance is approximately 3/4 of a mile. At the hearing in 1962 representatives of the Gardener District indicated that bus transportation to the subject property could not be furnished. At that time only one child resided in the subject area and she attended the Peoria Heights school on a tuition basis. She has now graduated from elementary school and the evidence fails to show whether there are or are not children of elementary school age presently residing in the area. At the hearing in 1966, representatives of the Gardener District testified that no request had ever been made for transportation of children to the Gardener grade school but if so requested transportation could be provided. It appears that such transportation would be specially arranged and would involve a vehicle other than the regular school bus of the Gardener Dis-

trict.

There is no dispute concerning rules of law applicable to the action of the Board of School Trustees nor the scope of review by the Courts. The Board of School Trustees as an administrative agency, is charged with the responsibility of determining school boundaries by applying the applicable statutory standards. School District No. 79 et al, v. The County Board of School Trustees of Lake County et al, 4 Ill. 2d 533, 123 N.E. 2d 475. The discretion of the Board cannot be exercised arbitrarily but must be based on substantial evidence. Appellant contends that the evidence does not support the standards required to be applied by the Board of School Trustees as are set forth in Section 7-6, Chap. 122, Ill. Rev. Stat. 1965, which provides "The County Board of School Trustees shall hear evidence as to the school needs and conditions of the territory in the area within and adjacent thereto and as to the ability of the districts affected to meet the standards of recognition as prescribed by the Superintendent of Public Instruction, and shall take into consideration the division of funds and assets which will result from the change of boundaries and shall determine whether it is to the best interests of the schools of the area and the educational welfare of the pupils that such change in boundaries be granted."

We believe that the action of the Board of School Trustees is supported by ample evidence and that Appellant's assertion to the contrary is without merit. It is the unavoidable result of any transfer of school property that one district will suffer a loss of revenue. The evidence shows that the loss of revenue to the Gardener District will not materially effect its ability to maintain and provide an adequate accredited educational program. It is also apparent that the increase in revenue to the Peoria Heights District is of little significance. We believe the evidence shows that the proposed transfer is not for the mere convenience of the residents as in School District 119 St. Clair County v. Stiehl, 22 Ill. App. 2d 363, 161 N.E. 2d 28, but is for the best interest of the educational welfare of the area as a whole. At the first hearing in 1962,

the then Superintendent of the Gardener District testified that bus transportation could not be offered to the area in question. Realizing the unfavorable implication that might be drawn from this position, the Superintendent of the Gardener District, at the hearing in 1966, testified that although no request for transportation had been received the district could and would provide such transportation. The Superintendent indicated that it was not practical to provide bus transportation but that transportation could be provided by the rather unusual procedure of using a special vehicle. Such evidence reveals that the location of the area in question in its relation to the schools of the area creates peculiar problems and difficulties arising from the physical and geographic conditions. Burnidge v. County Board, 25 Ill. App. 503, 167 N.E. 2d 21; Virginia Com. Unit School Dist. v. County Board, 39 Ill. App. 2d 339, 188 N.E. 2d 886. From such evidence and under such circumstances we believe that the Board of School Trustees could have properly concluded that the proposed transfer is in the best interest of the educational welfare of the area.

Finding no error in the judgment of the Circuit Court of Peoria County, said judgment is affirmed.

JUDGMENT AFFIRMED.

Alloy, J. and
Coryn, J. concur.

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PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. EDWARD HILL, Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a conviction at a jury trial for unlawful sale of narcotic drugs for which defendant, Edward Hill, was sentenced to the State Penitentiary for a term of not less than ten years, nor more than ten years and one day. The relevant portion of the indictment charged:

> . . . Edward Hill committed the offense of sale of a narcotic drug in that he knowingly sold to John Michaels for lawful money . . ., a quantity, (the exact quantity of which is unknown to said Grand Jurors), of a certain narcotic drug, to wit: heroin, in violation of Chapter 38 Section 22-3, of the Illinois Revised Statutes 1963, ...

The jury returned a verdict of guilty "in manner and form as charged." Subsequent thereto, defendant made motions for a new trial and in arrest of judgment, both of which were denied, and from which this appeal is taken.

Defendant's theory on appeal is confined to but a single issue. It is his contention that the conviction cannot stand because the indictment named John Michaels as the person to whom he allegedly sold the narcotic drug, when, in fact, that person's true and legal name was and is Roger Scannal. Defendant claims to have thereby been deprived of his constitutional right to be informed of the nature and cause of the accusation against him so that he might properly prepare his defense. Defendant further contends that, having been convicted of an unlawful sale of narcotics to John Michaels, he could not plead that conviction in bar to a subsequent prosecution for the same sale to Roger Scannal. This, he argues, twice places him in jeopardy for the same offense in specific violation of his constitutional rights.

The facts of the case involve the typical controlled sale

situation. Shortly before midnight on May 7, 1964, a person calling himself John Michaels came, unsolicited, to the 13th District Police Station and offered information relative to the defendant. Michaels was stripped and completely searched for possession of narcotics by police officers. Finding no narcotics on his person, the officers thereafter supplied Michaels with a quantity of prerecorded money with which to make the eventual purchase. It was prearranged at that time that Michaels would light a cigarette to signal the onlooking officers of the consummation of the sale.

At approximately 1:30 A.M. the following day, Michaels and defendant met at 2201 West Madison Street, Chicago. The two shook hands, and moments later an apparent exchange was made. Michaels lit a cigarette, and the officers approached defendant informing him that he was under arrest for a controlled sale of narcotics. The prerecorded currency was found in defendant's possession and a small tin foil package in Michaels' possession. The contents of the package were field tested at the scene. A subsequent crime laboratory analysis of the contents of the package found on Michaels proved it to be heroin. Michaels testified that he had not received any compensation from the police for assisting them relative to this defendant, but that he had received remuneration for performing similar services for them in the past.

Defendant charges that the police and prosecution deliberately misnamed and withheld the true identity of Michaels so that defendant could not intelligently plead to the indictment. Defendant, however, at the trial, in his post trial motions, and in his brief and argument on appeal has offered no proof to substantiate the charge. Rather, the evidence indicates to the contrary. The State had furnished defendant with a list of witnesses which included the name and address of John Michaels. The three officers who participated in the controlled sale and eventual arrest (Officers Allen, Sixkiller, and Overland) all

testified at the trial. Each stated that he knew the informer only by the name John Michaels, with the exception of Officer Allen who admitted also knowing Michaels by the name of Roger. Allen, however, stated that he was not sure of any other last name used by him. Michaels, called by the State, on recross-examination, testified that he went by another name; to wit, Roger Scannal. The defense, however, did not thereafter pursue the apparent inconsistency.

Defendant, testifying in his own behalf, admitted having known Michaels prior to the arrest as a result of their being in jail together at the Bridewell. On both cross and recross-examination, defendant admitted that he recalled "this guy" from seeing him before in jail. He further admitted having heard rumors prior to the alleged sale that Michaels was a police informer. On direct examination, defendant referred to the informer as Roger Scannal and acknowledged that he was acquainted with that person.

> Q. What happened while you were waiting?
>
> A. When I see this defendant - - this informer, Roger Scannal, approach me and light a cigarette up and - -
>
> Q. Did you know that he was a police informer at the time?
>
> A. Well, I have heard tell that he were.
>
> Q. So you knew beforehand?
>
> A. Certainly.
>
> Q. Did you know Roger Scannal before this occurrence?
>
> A. I believe so, I had known of him, ...

Prior to the trial, defendant did not move to quash the indictment, nor did his bill of particulars request any information relative to aliases used by the informer. At no time during the trial did defendant claim to have been surprised or misled. Moreover, neither defendant's motion for a new trial nor in arrest of judgment specified the objection here under consideration as grounds therefor.

It is here on appeal that defendant raises the alleged error for the first time.

Although our Code of Criminal Procedure vests in our court the power to notice plain errors or defects not brought to the attention of the trial court, that same statute compels us to disregard any irregularity or variance which does not affect substantial rights. [Ill. Rev. Stat. (1965) Chap. 38, Par. 121-9(a)]. [1] Thus, a court of review, as to non-jurisdictional errors only, must exercise judicial restraint by limiting the errors alleged to those which affect the substantial rights of the defendant. People v. Fleming, 54 Ill. App.2d 457, 203 N.E.2d 716 (1964), People v. Van Hyning, 72 Ill. App.2d 168, 219 N.E.2d 268 (1966). No question of guilt or innocence is presented. It is rather the single question of whether the naming of Michaels in the indictment prejudiced the substantial rights of defendant when, subsequent thereto, it became apparent that Michaels also went by another name.

The allegation of the specific facts and circumstances necessary to aggregate the essential elements of the offense charged is the only jurisdictionally requisite element which must be contained within the indictment. People v. Bridges, 67 Ill. App.2d 236, 214 N.E.2d 539 (1966). A "sale" of a narcotic drug is defined as any barter, exchange, or gift, or offer therefor made by any person. [Ill. Rev. Stat. (1963) Chap. 38, Par. 22-2-(L)], People v. King, 34 Ill.2d 199, 215 N.E.2d 223 (1966). The gravamen of the offense of unlawful sale of a narcotic drug is the sale itself and not the identity of the person to whom the sale was made. As such, the indictment contained all of the jurisdictionally requisite elements of the offense it purported to

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1 This statute has been superseded and replaced by Supreme Court Rule 615 [Ill. Rev. Stat. (1967) Chap. 110, Par. 101.615 (a)] without change in substance.

charge within the meaning of Ill. Rev. Stat. (1964) Chap. 38, Par. 111-3 (3) and our Uniform Narcotic Drug Act, which states:

> It is unlawful for any person to . . . , sell, . . . any narcotic drug, except as authorized in this Act. [Ill. Rev. Stat. (1963) Chap. 38, Par. 22-3]

The indictment charged a knowing sale of heroin for legal tender. The only question that thus remains is whether or not the alleged variance was to the prejudice of defendant's substantial rights and thereby not waived by his failure to bring it to the attention of the trial court.

Defendant relies on six cases in which a similar variance existed. These cases, for the most part, rejected the rule of idem sonans emphasizing the perils of double jeopardy and fatal variance of proof which arise when names in an indictment and subsequent proof of identity at the trial do not correspond. Without belaboring the point, these cases bear little relevance to the offense here under consideration. Here, the evidence as to identity is overwhelming. Defendant admitted that he knew "this guy" (Michaels or Scannal) prior to the sale, and that he "heard tell" that he was a police informer. No objection was made either before, during, or after the trial. Moreover, defendant never established, either directly or otherwise, that the informer's true, legal, and given name was other than John Michaels. Michaels simply testified as follows:

> Q. Mr. Michaels, what other name do you go by?
> A. Roger Scannal.
>
> Q. Do you have any other name, other than Roger Scannal?
> A. No, sir.

This was the extent of the evidence offered by defendant relative to the informer's true identity.

We concur in the decision reached in the case of People v. Smith, 70 Ill. App.2d 289, 217 N.E.2d 546 (1966), which bears directly on the error assigned to our court. There an almost identical controlled sale situation existed in which the informer, in a similar

capacity, actually participated in the crime. The informer, in that case, was named in the indictment, and testified, both under a name admitted to be false. Appealing his conviction, defendant alleged substantial prejudice by the court's refusal to compel the informer to divulge his true name on cross-examination. The court, in affirming the conviction, said:

> We conclude that the defendant was not prejudiced by the failure of the State to disclose to him the true name of an informer who had been produced as a witness, and whose identity was either known to the defendant or otherwise ascertainable by him.

The Smith decision is of particular significance in that in the instant case the falsity of the informer's name as recited in the indictment was neither admitted nor proven.

The Smith decision, furthermore, is in accord with the view as expressed in Collins v. Markley, 346 F.2d 230 (7th Cir., 1965), where the court said:

> . . . the omission of the name of a purchaser . . . is not a defect of such a fundamental nature as to render a judgment of conviction vulnerable to collateral attack.
>
> . . . , every essential ingredient of the offense was charged. Petitioner was sufficiently apprised of the nature of the charges against him. It seems certain that the record of the case is such that petitioner could successfully plead the judgment in bar to a later prosecution for the same offense. Furthermore, petitioner was not prejudiced in any way because the indictment failed to contain the name of the purchaser. Petitioner knew the name of the purchaser well in advance of the day that he entered his plea of guilty.

Defendant argues that as a practical proposition, there exists no justifiable reason why the true name of an informer should not be given an accused, prior to trial, to facilitate him in the preparation of his defense. In answer to defendant's contention, the case of Roviaro v. United States, 353 U.S. 53 (1957), though it reaches a contrary conclusion, establishes, and best exemplifies the fundamental reasoning employed in the informer situation. The court there said:

> . . . no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend upon the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. (Emphasis supplied)

Certainly, the Roviaro balancing concept was designed for the very situation that existed in both People v. Smith, supra, and the instant case. In Roviaro, the defendant possessed no possible means of identifying the informer, and the informer was never called as a witness thus preventing the defendant from gaining access to his vital testimony, hence the contrary conclusion. Here, the informer testified, and he was corroborated by three police officers. The informer's identity was known to defendant or, at the least, ascertainable by defendant by virtue of the list of witnesses supplied him. Nor did defendant, at any stage of the proceedings, object or seek to prove the informer's true identity to be other than that which was recited in the indictment. The charge was one for unlawful sale and not mere possession. Under these attendant circumstances, we feel the balancing concept favors nondisclosure notwithstanding the fact that the informer participated in the actual crime. Cf. People v. Jarrett, 57 Ill. App.2d 169, 178-182, 206 N.E.2d 835 (1965), People v. Nettles, 34 Ill. App.2d 52, 54-56, 213 N.E.2d 536 (1966), McCray v. Illinois, U.S. Sup. Ct. (decided 3/20/67), 35 LW 4261, where our highest court has very recently adhered to their unwillingness to impose any absolute rule which would require disclosure.

The alleged variance will not twice place defendant in jeopardy for the same offense as he contends. The testimony containing Michaels' admission relative to the name of Scannal is a matter of record and will be sufficient to protect defendant from a second prosecution. Furthermore, substantial as well as formal identity may

always be shown at a later date by parol testimony. People v. Jankowski, 391 Ill. 298, 63 N.E.2d 362 (1945), People v. Petropoulos, 59 Ill. App.2d 298, 208 N.E.2d 323 (1965), aff. 34 Ill.2d 179, 214 N.E.2d 765 (1966). The alleged defect, if at all, did not affect defendant's substantial rights.

For the above reasons, the conviction is affirmed.

AFFIRMED.

BURKE, J., and BRYANT, J., concur.